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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GEN Docket No. 00-185
	)	
To: The Commission	)	

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES, THE CITY OF PALO ALTO, CALIFORNIA, AND THE CITY OF EUGENE, OREGON

Tillman L. Lay
Miller, Canfield, Paddock and Stone, P.L.C.
1900 K Street, N.W., Suite 1150
Washington, DC 20006
(202) 429-5575

Counsel for the City Coalition

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SUMMARY

The opening comments serve only to confirm the wisdom of our position: cable modem service is a "cable service" within the meaning of 47 U.S.C.§522(6). Those who contend otherwise seek to lead the Commission astray by trying to rewrite the Act, a job for Congress, not the Commission. Others believe that the Commission should adopt a "result-oriented" approach of addressing a welter of policy, convergence, and market structure issues before addressing the regulatory classification issue. This puts the cart before the horse. Because resolution of the threshold regulatory classification issue is essential to untangle the issues and arguments of many commenters, the Commission should turn first to the text and legislative history of the Act and determine the proper classification of cable modem service. If the Commission agrees with us that cable modem service is a "cable service," it need not reach many of the unquestionably difficult and novel issues that would be triggered by a different classification.

Opponents of "cable service" classification cannot escape the textual definition of cable service. They all but ignore the second half of the "cable service" definition found in 47 U.S.C. §522 (6)(B). They offer no rational, coherent explanation of what interactive, two-way services are encompassed within the broad language of Section 522 (6)(B) that would not also include cable modem service.

Those that argue that cable modem service is not "other programming service" confuse what a cable modem subscriber has to access to -- literally everything that every other cable modem subscriber has access to -- with what each cable modem subscriber chooses to do with that access. "Other programming service" speaks only to the former,

while the expanded "interaction" and "use" language in the second half of the "cable service" definition speaks to the latter. Virtually all of the examples of cable modem service functions that opponents cite are indeed made "available to all subscribers generally." The only even arguable exception is individually addressed e-mails. But even there, analogues to traditional cable service exist. Moreover, even if incoming e-mails were not viewed as being "other programming service," opponents try to make the tail wag the dog: They offer no explanation as to how this one isolated component of cable modem service transforms the entire package of functions that is cable modem service into something other than a cable service. In fact, Congress has made plain that the bundling of a non-cable service with cable service does not change the "cable service" status of the offering.

"Cable service" classification opponents also overlook the inherent interplay between, on the one hand, the broad preexisting definition of "other programming service" and, on the other hand, the new phase "or use" in Section 522 (6)(B). When these two are coupled together, the only logical, plain-language conclusion is that, as a result of the 1996 amendment, "cable service" now includes *all* subscriber interaction with or use of *all* information services provided over a cable system.

Application of Title VI to cable modem service would easily harmonize with existing cable service regulation. Moreover, those who believe that Title I provides a more flexible tool for the Commission to fashion a national cable modem service policy ignore that Title I cannot be used to trump the specific provisions of Title VI, and that Title VI is itself a national policy chosen by Congress.

ILEC pleas for regulatory parity are misguided. Whether opponents like it or not, the Act still contains separate Titles, and as a result, some regulatory disparity is mandated by the Act. Commenters also overlook that regulatory parity across Titles in the Act is a chimera, for their proposals would only result in new regulatory disparities. ILECs hold the key to escape the jail of regulatory disparity they perceive: They are now free under the 1996 Act to become cable operators. Finally, the side-by-side, inter-Title competition envisioned by the Act offers definite benefits: It serves as a vital safeguard against market failure in a critical market like broadband, where it is far too soon to say with any confidence that competition will render the protection of common carrier regulation unnecessary. Total abandonment of any form of common carrier regulation in that market would represent a radical departure from the Act, a departure only Congress can make.

Like cable modem service, interactive television is a "cable service."

The uncertainty and ambiguity spawned by *Portland* and *Gulf Power* ill serves the public, industry, and local governments. The Commission should fulfill its responsibility by clearly and promptly eliminating that uncertainly and ambiguity. The Commission should promptly initiate and complete a rulemaking classifying cable modem service as a "cable service."

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The National League of Cities ("NLC"), the Texas Coalition of Cities for Utility Issues ("TCCFUI"), the City of Palo Alto, California, and the City of Eugene, Oregon (collectively, the "City Coalition" or "Coalition"), submit these reply comments in response to the opening comments filed in response to the Notice of Inquiry ("*NOI*"), released September 28, 2000, in the above-captioned proceeding.

INTRODUCTION

It should hardly be surprising to the Commission that the opening comments in this proceeding displayed a remarkable divergence of opinion on virtually all of the questions presented by the *NOI*. This diversity, however, has not led the City Coalition to alter in any way the position set forth in its opening comments: Cable modem service is a "cable service" within the meaning of 47 U.S.C. §522 (6), but if the FCC should conclude otherwise (wrongly, we believe), then cable operators should be required to

provide third-party ISPs with access to their cable modem platforms pursuant to the open access requirements of Title II.

Because we believe that the Communications Act of 1934, as amended (the "Act"), provides a clear answer to the question of the proper regulatory classification of cable modem service, and that answer is that cable modem service is a "cable service," our reply comments will focus primarily on that issue, rather than the myriad of other issues raised by commenters based on a contrary regulatory classification of cable modem service. If, as we believe it should, the Commission agrees with us that cable modem service is a "cable service," it need not reach many of the unquestionably difficult and novel issues that would be triggered by a different regulatory classification.

I. CONTRARY TO THE SUGGESTIONS OF SOME COMMENTERS, THE ACT DOES PROVIDE A CLEAR ANSWER TO THE QUESTION OF THE PROPER REGULATORY CLASSIFICATION OF CABLE MODEM SERVICE, AND THE ACT REQUIRES THE COMMISSION TO HEED THAT ANSWER RATHER THAN BE GUIDED BY POLICY AND MARKET STRUCTURE ISSUES UNHINGED FROM THE ACT'S TEXT.

At the outset, we note that several commenters seek to lead the Commission astray into debates that can be resolved only by Congress, not the Commission, under the Act as it currently exists. These debates serve only to distract attention from the critical issue at hand: the proper regulatory classification of cable modem service. It is resolution of this threshold issue that must precede any other issues the Commission addresses in this

proceeding, because the proper regulatory classification of cable modem service will largely dictate the resolution of most of the other issues raised by commenters.

In fact, resolution of this threshold classification issue is essential in order to untangle the issues and arguments that most commenters make. An example will prove the point. Many commenters claim that cable modem service can and should be separated into a "telecommunications service" component and an "information service" component.[1] But this argument is built entirely on the assumption that -- and indeed makes no sense at all unless -- cable modem service is not a "cable service" (an assumption, of course, with which we disagree). One could just as easily argue, for instance, that there are also two separate components of traditional multichannel video cable service: One component being transmission of video signals over the system in the form delivered to the system by the cable programmer (a "telecommunications service"), and the other being the content of the video programming delivered over those facilities (a video "information service").[2] We know, however, that as a legal matter, traditional video cable service cannot be subdivided in this way because the Act prevents it. *See, e.g.*, 47 U.S.C. §§541(c) & 544 (f)(1). If, as we believe, cable modem service is also a "cable service," the same conclusion applies. For present purposes, however, our point is a more general one: the Commission cannot meaningfully address many of the policy

[1] *See, e.g.*, Verizon Comments at 15-16; Earthlink Comments at 27; OpenNet Comments at 11-12.

[2] *See, e.g.*, City Coalition Comments at 17-18.

arguments of several commenters unless or until it first determines the proper regulatory classification of cable modem service.

A few commenters nevertheless suggest that the Commission's approach should be "result-oriented": the Commission should first address policy and market structure issues before it turns to what these commenters apparently perceive to be the technical legal side-issue of the proper regulatory classification of cable modem service.[3] These commenters have it backwards. The Commission's job is not to stretch or mutate the Act to meet the Commission's policy preferences, but to carry out faithfully the policy preferences of Congress as reflected in the Act. And the first and primary source for finding Congress' preferences is the text of the Act and its legislative history, *not* generalized policy and market structure analyses unhinged from the text and legislative history.

In a similar vein, many commenters urge the Commission essentially to rewrite the Act. These commenters believe that the compartmentalization of sectors of the communications industry that is reflected in the Act's separate Titles is outdated in light of technological convergence, and that there is a consequent need for a "new regulatory paradigm" of competitive neutrality across the Title boundaries of the Act.[4] Regardless of the merit of these arguments as a matter of abstract industry policy, however, the

[3] *E.g.*, CPI Comments at 2; Cable & Wireless Comments at 11; Qwest Comments at 3.

[4] *E.g.*, USTA Comments at i & 7; Cable & Wireless Comments at 11; SBC/BellSouth Comments at i-ii & 12; Qwest Comments at 3.

Commission is not at liberty to heed them. The Commission's responsibility is *not* to rewrite the Act, but to ascertain and carry out Congress' instructions in that Act.

Perhaps more importantly, regardless what one may think of Congress' policy as reflected in the Act, that policy is unmistakably clear: Technological convergence and the abstract idealism of regulatory parity notwithstanding, Congress has in fact preserved the separate Titles of the Act and, as a result, has decreed that different sectors of the communications industry will be treated differently. Congress certainly was aware of the convergence issue when it amended the Act in 1996, but it nevertheless declined to adopt the proposed new "Title VII" to the Act, opting instead only for Section 706 of the 1996 Act, which limits the Commission's authority to information-gathering, reporting and inquiry.[5] Section 706 certainly does not authorize the Commission to override or remove the existing regulatory boundaries that are drawn by the Titles of the Act.

Accordingly, before responding to the siren calls of many commenters urging it to venture into policy matters relating to technological convergence and market structure and performance, the Commission should turn first to the language of the Act and the threshold issue of the proper regulatory classification of cable modem service.

[5] *See* Comcast Comments at 20-21 & n. 56

II. CONTRARY TO THE CLAIMS OF SOME COMMENTERS, CABLE MODEM SERVICE IS A "CABLE SERVICE."

Several commenters agree with our position that cable modem service is a "cable service."[6] Those that claim otherwise rely almost exclusively on the *Portland* and *Gulf Power* cases.[7] We have already pointed out the many defects of the *Portland* and *Gulf Power* opinions on this issue and will not repeat them here.[8] Instead, we will direct our attention to the arguments beyond *Portland* and *Gulf Power* that opponents to our position raise.

A. Opponents of "Cable Service" Classification Misread the Relevant Statutory Language and Legislative History.

Opponents of "cable service" classification almost uniformly advance the same three legal arguments as to why they believe cable modem service is not a "cable service." First, they claim that cable modem service is not "one-way" "video programming" within the meaning of 47 U.S.C. §522 (6)(A)(i).[9] Second, they assert that

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[6] *See, e.g.*, NATOA Comments at 7-11; Los Angeles Comments at 9-11; City of New Orleans Comments at 3-10; AT&T Comments at 5 & 12-19; Comcast Comments at 16-18; Cox Comments at i & 26; NCTA Comments at 2 & 5-8.

[7] *AT&T v. City of Portland*, 216 F. 3d 871 (9th Cir. 2000); *Gulf Power Co. v. FCC*, 208 F. 3d 1263, *reh. denied*, 226 F. 3d 1220 (11th Cir. 2000), *cert. petit. filed*, No. 00-832 (U.S. filed Nov. 22, 2000).

[8] City Coalition Comments at 21-23 & 25-26. We note, however, that several other commenters pointed out many of the same, as well as additional defects in *Portland* and *Gulf Power*. *See, e.g.*, AT&T Comments at 17-19 & n. 30, NCTA Comments at 6-8 & n.8; NATOA Comments at 7-10 & 16-17.

[9] *See, e.g.*, ASCENT Comments at 6; Competitive Access Coalition Comments at 6-8 &19; Earthlink Comments at 5-7; SBS/BellSouth Comments at 42-44; Verizon Comments at 13-15.

cable modem service is not "other programming service" within the meaning of 47 U.S.C. §§522 (6)(A)(ii) and 522 (14) because it is not "ma[de] available to all subscribers generally."[10] Third, they try to sidestep or belittle the unequivocal legislative history of the 1996 amendment adding "or use" to the "cable service" definition.[11] Each of these arguments is misguided.

1. "Cable Service" Classification Opponents Ignore the Entire Second Half of the "Cable Service" Definition in 47 U.S.C. § 522(6)(B).

Based on the comments of most "cable service" classification opponents, one would never know that the "cable service" definition extends beyond the one-way transmission of video programming and other programming service set forth in 47 U.S.C. § 522(6)(A).[12] These commenters simply overlook the entire second half of the cable service definition set forth in 47 U.S.C. § 522(6)(B), which encompasses "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."

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[10] *See, e.g.*, Competitive Access Coalition Comments at 20-23; Earthlink Comments at 11; OpenNet Comments at 14, SBC/BellSouth Comments at 43; Verizon Comments at 13-15.

[11] *See, e.g.*, Earthlink Comments at 9-11; OpenNet Comments at 16; SBC/Bell South Comments at 43.

[12] Some commenters are apparently even unaware of 47 U.S.C. §522(6)(A)(ii), arguing that cable modem service is not a "cable service" because it involves more than the "passive receipt" or one-way transmission of video programming, and citing *Internet Ventures*, 15 FCC Rcd 3247 (2000), as support for their position. *E.g.*, ASCENT Comments at 6; Competitive Access Coalition Comments at 19. There commenters seem blissfully unaware that the Commission went out of its way in *Internet Ventures* to note that the "video programming" limitation in 47 U.S.C. § 532 "stands in stark contrast to the definition of 'cable service' set forth in the Communications Act which, in addition to offering video programming, also permits cable operators to offer 'other programming services.'" 15 FCC Rcd at 3250.

In light of Section 522(6)(B), there can be no question that "cable service" is *not* merely "passive" or "one-way," but instead clearly includes interactive, two-way services. The simplistic suggestions to the contrary of some commenters (and of the *Portland* and *Gulf Power* courts) seem to flow from an unspoken (and impermissibly legislative) wish that Congress had drawn more simplistic definitional lines in the Communications Act than the plain language of its text permits anyone reasonably to infer.[13]

More fundamentally, "cable service" opponents simply fail to provide any rational, coherent explanation of what interactive, two-way services are encompassed within the broad language of 47 U.S.C. § 522(6)(B) that would not also include cable modem service. Subscriber-specific selection of video programming won't do, because cable service includes "other programming service" in addition to "video programming." And subscriber-specific retrieval of video programming and other information won't do either, because Section 522 (6)(B) already included that even before it was expanded in 1996 to include subscriber "use" of such information. Opponents apparently hope that if Section 522(6)(B) is ignored or slighted, maybe it will go away. But Congress, by its plain language, does not allow the Commission that option.

[13] Indeed, as pointed out in our opening comments, the simplistic "one-way video" versus "two-way non-video" line between cable service and telecommunications service that many commenters try to draw is doubly flawed. It is not only inconsistent with the "cable service" definition, it is also inconsistent with the "telecommunications service" definition, since the Act clearly provides that one-way video can, in certain circumstances, be a "telecommunications service." *See* 47 U.S.C. § 571(a)(2); City Coalition Comments at 19 & n. 24.

2. Cable Modem Service Is "Other Programming Service" Because It Is Made Available To All Subscribers Generally.

Many opponents of the "cable service" classification argue that cable modem service is not "other programming service" within the meaning of 47 U.S.C. § 522(14) because (according to these commenters) a cable operator does not make various capabilities included within the typical cable modem service package -- e-mail, chatrooms, customized homepages, Internet-use derived customer profiles, and the like -- "available to all subscribers generally." According to commenters, these capabilities are instead within the control of, and individualized by, each subscriber.[14]

This argument is flawed in several respects. As an initial matter, there can be no dispute that cable operators that offer cable modem service do in fact make that service "available to all subscribers generally." Opponents of this position confuse what a cable modem subscriber has access to -- literally everything that every other cable modem subscriber has access to -- with what each cable modem subscriber chooses to do with that access. The "other programming service" definition speaks only to the former. The

[14] The Competitive Access Coalition (at 16) goes a bit further and claims that cable modem service is a "telecommunication service" and not a "cable service" because subscribers (rather than the provider) have "complete control over the content they receive." Yet later on in its comments, the Competitive Access Coalition contradicts itself by claiming that ISPs (and thus the cable modem service providers too) "differ greatly from one another" in caching, proprietary content, offers of newsgroup access, webspace and web hosting (*id.* at 69). *Accord* OpenNet Comments at 6 (ISPs are "content aggregators" offering varied content). If ISPs and cable modem service providers "differ greatly" in their content, then it is they who ultimately control content. Further, it is precisely this merger of content and conduit that defeats the "telecommunication service" argument and instead underscores the content and conduit merger in cable modem service that is the hallmark of "cable service."

"interaction" and "use" language in Section 522(6)(B), which opponents largely ignore, speaks to the latter.

In fact, most of the examples of supposedly subscriber-specific aspects of cable modem services given by opponents of our position are unquestionably "available to all subscribers generally." Certainly access to all Internet sites and websites, and all chat rooms on the Internet, is available to all cable modem subscribers. That individual subscribers do not visit the same websites or chatrooms, and instead visit their own chosen sites, is beside the point. No one would suggest, for instance, that pay-per-view service, video on demand, premium per-channel services like HBO, or any optional tiers of traditional video programming services are not a "cable service" merely because some subscribers choose to subscribe to their own unique combination of those services, and others choose not to subscribe to any of these optional services at all.

The simple truth is that, as is the case with various optional packages of traditional video programming services, all cable modem subscribers have the same access to all of the capabilities of the cable modem service. Every cable modem subscriber can go to any website or chatroom that they wish. Moreover, the ability of an individual subscriber to customize his or her own homepage, or of an Internet vendor (like Amazon) to customize a subscriber's profile, has direct analogues with traditional video cable services: Traditional video subscribers can and do program their remotes to block out or eliminate certain video channels and to elevate others to "favorite channels" status, yet no one would suggest that this means that the unique package of video channels that a particular subscriber creates in this manner is not a "cable service." Similarly, subject to the

restrictions on use and disclosure contained in 47 U.S.C. § 551, a cable operator may, much like Amazon, develop its own profile of the types of optional pay-per-view, video on demand, per-channel or other optional video programming services to which each subscriber subscribes and make use of that profile to market additional services to its subscriber.

Moreover, ISPs' descriptions of many of the services they offer or plan to offer sound remarkably like not only "other programming service," but also "video programming" within the meaning of Section 522(6)(A)(i). Thus, ISP commenters boast that they would like to use the cable modem platform to provide "television-like programming" in "competition with cable companies," and repeatedly refer to video-streaming and interactive television as new services that the broadband cable modem platform will make possible.[15] That these new broadband video services are intended to be made "available to all subscribers generally" seems beyond dispute.

In fact, the only aspect of cable modem service that even arguably might be characterized as not being made available to all subscribers generally are the individually addressed e-mails that each subscriber may receive. But even here, there are direct analogues to more traditional cable services. Many, if not most, cable systems include channels carrying only character-generated text messages (often on PEG channels). Moreover, many PEG channels are used for individualized, closed-circuit delivery of programming to a few select locations (such as to police or fire stations, or to selected

[15] *E.g.*, Competitive Access Coalition Comments at 58; OpenNet Comments at 8.

schools) rather than to all subscribers generally, but no one has suggested that this aspect of PEG channel programming means that the package of services of which is a part is not a "cable service."

Furthermore, even if individually addressed, incoming e-mails were not viewed as being "other programming service," opponents of the "cable service" classification do not explain how that one isolated component of cable modem service magically transforms all of the other components of cable modem service into something other than a "cable service." Indeed, it is difficult to imagine a better example of the tail wagging the dog. As NATOA observes (at 7), customers do not subscribe to cable modem service solely to send and receive e-mails. To the contrary, narrowband dial-up access serves that need just as well, and far more cheaply, than cable modem service or any other broadband platform. Rather, while cable modem subscribers no doubt take advantage of e-mail capability, it is the other unique aspects of cable modem service -- Website, video and other broadband content access capability, and the like -- that distinguish cable modem service. (ISPs concede as much when they claim that the broadband Internet access market is separate from the dial-up narrowband market.) Further, as AT&T points out (at 19), the fact that e-mail capability, standing alone, may not be "other programming service" does not mean that the far broader package that is cable modem service is not "other programming service." As Congress made clear in the legislature history of the 1984 Cable Act, the inclusion of a non-cable service in a package that includes cable service does not transform a cable service into a non-cable service. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. at 44 (1984).

In short, cable modem service comfortably fits within the definition of "other programming service." It is therefore a "cable service."

3. The Legislative History Supports the Conclusion That Cable Modem Service Is A "Cable Service."

Opponents of the "cable service" classification try to belittle the 1996 amendment of the "cable service" definition and the legislative history explaining that amendment. For the most part, opponents rely on *Portland* and *Gulf Power* to support their assertions.[16] As we have previously pointed out, however, both the *Portland* and *Gulf Power* courts neglected to address the 1996 amendment and its legislative history, especially the critical *1996 Conference Report*,[17] which is, of course, the most reliable and authoritative form of legislative history.[18]

SBC/BellSouth argues (at 43-44 & n.132) that the 1996 amendment does not matter because it amended only Section 522(6)(B), and did not change the "other programming service" definition in Section 522 (6)(A)(ii) and 522(14).[19] But SBC/Bell

[16] *See, e.g.*, ASCENT Comments at 6-9 & n.17; Earthlink Comments at 9-11 & 15-17; SBC/BellSouth Comments at 43-44.

[17] H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. at 169 (Jan. 31, 1996)("*1996 Conference Report*").

[18] City Coalition Comments at 7, 21 & 25-26. Moreover, as AT&T notes, cable modem service also qualifies as "cable service" under the original 1984 Cable Act in effect prior to the 1996 amendment. *See* AT&T Comments at 12-13.

[19] Earthlink similarly argues (at 11) that if Congress had wanted to include cable modem service in "other programming service," it would have amended 47 U.S.C. §522 (14) to read "information *services* that a cable operator makes available to all subscribers generally "(emphasis in original). But such an amendment actually would have *narrowed* the "other programming service" definition, since the term "information" in the original definition is, on its face, broader than Earthlink's proposed "information service" replacement.

South overlooks two points that are fatal to its position. First, its *Gulf Power*-based explanation of the 1996 amendment -- that it was merely intended to include services that cable operators offer subscribers "to allow them to interact with traditional video programming"[20] -- ignores that "cable service" is *not* restricted to "traditional video programming," but includes "other programming services" under Section 522(6)(A)(ii).

Second, and perhaps more fundamentally, SBC/BellSouth fails to come to grips with the inherent interplay between, on the one hand, the broad, preexisting "other programming service" component of the cable service definition contained in Section 522 (6)(A)(ii) and, on the other hand, the 1996 addition of the phrase "or use" in Section 522(6)(B). When the already broadly-defined downstream component of "other programming service" is coupled with the newly-expanded upstream scope of subscriber interaction contemplated by the 1996 addition of the phrase "or use," the only logical, plain-language conclusion is that the 1996 amendment contemplates *all* forms of subscriber interaction with or use of *all* of the "information" provided to subscribers. This conclusion is, of course, confirmed by the *1996 Conference Report:* As a result of the 1996 amendment, "cable service" now includes *all* subscriber interaction with or use of *all* "information services" provided over a cable system.[21]

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[20] *Id.* at 44 (quoting *Gulf Power*, 208 F. 3d at 1276-77).

[21] *See 1996 Conference Report* at 169 (Jan. 31, 1996); City Coalition Comments at 6-7 & 24-25.

B. Parties' Other Arguments Against the "Cable Service" Classification Do Not Withstand Scrutiny.

Some commenters attempt to raise other, less statutory-based arguments against classifying cable modem service as a "cable service." Thus, at least one commenter adopts the *Portland* rationale that application of Title VI to cable modem services would lead to supposedly "perverse" results.[22] But that is not true. The Title VI requirements cited by *Portland*, like the vast majority of Title VI requirements, apply to cable systems and cable system operators, *not* to "cable services," which Title VI leaves largely unregulated.[23] Those provisions of Title VI that do apply to cable operator provision of cable modem service "would easily harmonize with existing cable service regulation."[24]

Likewise misguided is SBC/BellSouth's assertion (at 44) that if cable modem service is a "cable service," the Internet access offerings of its satellite, fixed wireless, DSL and dial-up competitors would also be subject to Title VI. This claim is utter nonsense. We presume that SBC/BellSouth would concede that a cable operator's offering of traditional multichannel video services is a "cable service" subject to Title VI. We further presume that SBC/BellSouth would concede that the multichannel video service offerings of DBS providers compete with those of franchised cable operators. Yet no one suggests that DBS providers are subject to Title VI merely because they compete

[22] *E.g.*, Earthlink Comments at 12 (quoting *Portland*, 216 F. 3d at 877).

[23] *See* City Coalition Comments at 13-16; AT&T Comments at 18; NCTA Comments at 7 n.8.

[24] NCTA Comments at 6 n.4. *Accord* City Coalition Comments at 13-16; AT&T Comments at 30-31.

with cable operators that are subject to Title VI. The reason: DBS providers do not offer cable service over a "cable system" and therefore are not a "cable operator" subject to the Title VI. 47 U.S.C. §§522 (5) & (7). The same would be true, of course, with respect to non-cable competitors of cable modem service.[25]

Another argument that pervades some "cable service" opponents' comments is the claim that the Commission's general Title I ancillary authority is a better choice for regulating cable modem service because Title I is more "supple" and "flexible" than Title VI (or Title II) and would better enable the Commission to sweep away state and local regulation and to establish a "uniform, nationwide policy" with respect to cable modem service.[26] This argument is fatally flawed in two critical respects.

First, because cable modem service is a "cable service," Title VI applies to it. The Commission cannot use its general Title I authority to trump the specifically applicable requirements of Title VI (or, for that matter, any other Title of the Act).[27] Otherwise, the

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[25] SBC/BellSouth is not alone among telecommunications industry commenters in its ignorance of the substance of Title VI. CompTel, for instance, speaks (at i & 6) of "*de jure*" exclusive cable franchises, apparently unaware that exclusive cable franchises are prohibited by law. *See* 47 U.S.C. §541 (a)(1). Perhaps this Title VI blindness helps explain the telecommunications industry's disappointing failure to fulfill its 1996 Act promise to Congress that it would compete against incumbent cable operators in the multichannel video service market.

[26] *See, e.g.*, CompTel Comments at 33; New Hampshire ISP Assn. Comments at 1; OpenNet Comments at 15-16.

We note that Cox (at ii-iii, 26, 28 & 42-43) curiously makes this Title I policy argument as well, even though Cox also simultaneously claims (at i & 26) -- albeit with much less vigor -- that cable modem service is a "cable service." Given Cox's recent decision to stop paying cable franchise fees on cable modem service, Cox's apparent inconsistency would appear to be a rather transparent and self-serving effort at "heads I win, tails you lose."

[27] *See* NCTA Comments at 35.

Commission would have the authority to write all of the Titles other than Title I out of the Act. If Congress' will is to have primacy over the Commission's (as it must), such an open-ended, Title-swallowing construction of Title I cannot stand.

Second, contrary to the suggestions of these Title I "national policy" fanatics, Title VI is itself a comprehensive "national policy concerning cable communications." 47 U.S.C. §521(1). Because cable modem service is a "cable service," there is indeed a "national policy" applicable to it -- the one chosen by Congress in Title VI, not one crafted out of whole cloth under the unilluminating, generalized rubric of Title I. That some commenters may prefer a different national policy for cable modem service is irrelevant. If a different national policy is desired, only Congress, not the Commission, can craft it.

C. ILEC Pleas for "Regulatory Parity" Do Not Detract from the Conclusion That Cable Modem Service Is A "Cable Service."

Although not directed exclusively at attacking the "cable service" classification of cable modem service, another common argument made in the comments, primarily by ILECs, is a plea for "regulatory parity" and "competitive neutrality."[28] The problems with this argument are threefold.

First, while these commenters clearly wish otherwise, the Act still contains separate Titles and, as a result, explicitly prevents such "regulatory parity" in many cases.

[28] *See, e.g.*; CenturyTel Comments at 2; OPASTCO Comments at 2; Qwest Comments at 1 & 3; SBC/BellSouth Comments at i-ii & 12; USTA Comments at 7-8; Verizon Comments at 2 & 22.

Examples abound. Television broadcasters compete with cable operators, yet they must be regulated under different Titles. The same is true with respect to DBS and MMDS providers, on the one hand, and cable operators on the other. And the same is also true of wireline telecommunications service providers, on the one hand, and wireless telecommunications service providers on the other.

Second, even if ILECs' "regulatory parity" proposals were adopted, they would not result in regulatory parity. They would instead create new regulatory disparities, albeit ones these commenters apparently see as beneficial to them. The comments leave no doubt that many of the services that are or will be offered over DSL and cable modem service -- video streaming, interactive television, and "standard television quality video"[29] -- will compete with traditional cable video programming services currently subject to Title VI. Thus, if cable modem services were exported either to Title I or Title II, a new regulatory disparity (and consequent lack of "competitive neutrality") would be spawned: Cable modem service would be regulated differently than many of the traditional cable services with which it competes.

In fact, at least as the Communications Act is currently structured, "regulatory parity" across Titles of the Act is a chimera. Under whatever Title of the Act cable modem service is classified, some degree of regulatory disparity is inevitable. It is for that reason that the Commission should adhere to the statutory language and legislative history of the Act to answer the regulatory classification question. And as we have

[29] *E.g.*, TIA Comments at 9-10; Competitive Access Coalition Comments at 58; OpenNet Comments at 8.

shown, those sources clearly point to the conclusion that cable modem service is a "cable service."

A third point that ILEC "regulatory parity" proponents overlook is that much of the regulatory disparity about which they complain is, in many respects, more apparent than real. And to the extent it exists, it serves useful public policy goals.

As an initial matter, ILECs ignore the fact that, at least with respect to cable modem services, the Act provides them with the keys to escape the jail of regulatory disparity that they perceive: The 1996 amendments allow ILECs to become cable operators and to provide "cable service" under Title VI or, alternatively, through open video systems if they wish. *See* 47 U.S.C. §§571 (a)(3)(A) & (B). To be sure, unlike the case with DSL, ILECs may have to make the investment necessary to replace their legacy copper-wire pair residential networks to do that, but the resulting expansion of residential broadband capacity would be a positive development from the standpoint of competitive policy and consumer choice. In any event, given ILECs' near unanimous failure to follow through on their promises to Congress that, if the 1996 Act were passed, they would enter the multichannel video service market to compete with incumbent cable operators, the Commission should have little sympathy for ILEC complaints about regulatory disparity.

Moreover, that the Act sanctions the possibility of side-by-side competition between providers subject to different Titles of the Act is not, as the ILECs' claim, necessarily reflective of the Act's obsolescence or of unsound policy. To the contrary, inter-Title competition can and does offer significant public policy benefits.

Preservation of the Title II "common carrier" model, at least for a time, to compete side-by-side with non-common carrier broadband access models serves as an important check, or safety net, in an embryonic arena like broadband Internet access, where rosy predictions of future competition are premature and uncertain at best. Indeed, ILEC commenters inadvertently underscore the wisdom of the Act's preservation of inter-Title competition. ILEC commenters almost uniformly argue that, because cable modem service competes with their DSL offerings and enjoys substantially greater market share than DSL, ILEC DSL offerings should be completely deregulated -- either through forbearance of Title II obligations with respect to DSL, or by treating DSL as a Title I "information service."[30]

In other words, ILECs would seem to prefer a world where *no one* has the Title II obligation to make broadband access service universally available to all and on fair and non-discriminatory terms. Given the possibility that broadband may eventually supplant the public switched network as the primary means for persons to communicate with one another, the City Coalition suggests that completely abandoning the time-honored and time-tested common carrier model with respect to broadband in the speculative hope that competition may eventually make it unnecessary in the future is a reckless, dangerous policy. In any event, it certainly would be radical departure from over a century of communications policy in this nation, and we believe that the Act gives only Congress,

[30] *See, e.g.*, Century Tel Comments at 1 & 6; Qwest Comments at 3; SBC/BellSouth Comments at iii & 12; USTA Comments at 8; Verizon Comments at 3 & 22.

not an unelected Commission, the authority to make such a fundamental change in national policy.

D. Commenters' Reliance on *Broward County* Is Misplaced.

At least one ILEC and a few cable operators rely on the recent *Broward County* decision[31] for the proposition that regulation of their high-speed broadband offerings would violate the First Amendment.[32] Their reliance is misplaced.

As an initial matter, *Broward County* is inherently suspect because, by leap-frogging past the statutory issues to address the First Amendment issues, the court flagrantly violated the longstanding bedrock principle that courts should not address constitutional issues without first addressing underlying statutory issues.[33] Moreover, *Broward County* rests on a gross misreading of *Turner Broadcasting System v. FCC,* 512 U.S. 622 (1994). Contrary to the *Broward County* court's claim, the Supreme Court in *Turner* did *not* hold that cable operators are subject to the same First Amendment standards as the print media.[34] Further, *Broward County* turns *Turner* on its head: *Turner* upheld the must-carry rules against First Amendment challenge, even though the local broadcaster-beneficiaries of must-carry, unlike unaffiliated ISPs, have their own

[31] *Comcast Cablevision of Broward County v. Broward County*, No. 99-6934-Civ (S.D. Fla. filed Nov. 8, 2000)("*Broward County*").

[32] *E.g.*, Verizon Comments at 35-39; NCTA Comments at 38; AT&T Comments at 11; Cablevision Systems Comments at 15; Charter Comments at v; Comcast Comments at 26-27.

[33] *E.g., Ashwander v. TVA*, 297 U.S. 288 (1936); *Bell Atlantic v. Prince George's County*, 212 F. 3d 863 (4th Cir. 2000).

[34] *See Turner*, 512 U.S. at 657; Consumers Union Comments at 7.

local broadcast transmission facilities to circumvent the cable system bottleneck. Unaffiliated ISPs wishing to provide broadband content, in contrast, have no such route to bypass the cable system bottleneck. And given cable operators' current broadband access market share and the technological and cost shortcomings of competing delivery systems,[35] cable's bottleneck position in broadband access is in many respects far more pervasive than cable's bottleneck over local broadcasters.

Verizon's reliance on *Broward County* is even more perplexing, since it is flatly inconsistent with Verizon's position that cable modem service is not a "cable service." Aside from its dubious First Amendment analysis, one conclusion about *Broward County* seems clear: Its logic makes absolutely no sense at all unless cable modem service is a "cable service." If *Broward County*'s expansive reasoning were applied to telecommunications services, as Verizon suggests, that would mean that Title II -- and indeed all state common carrier regulation of telecommunications service providers as well -- violates the First Amendment. After all, under the *Broward County* court's reasoning, every telecommunications service provider could (but for its common carrier obligation) choose to exercise its supposed First Amendment right to refuse to carry the messages of those with whom it disagrees, or to insert preemptory messages containing its own political views to drown out or replace its customers' messages. As far as we are aware, however, no court has held that the First Amendment exterminates the application

[35] *See, e.g.*, Cable & Wireless Comments at 7-10.

of common carrier principles to telecommunications service. Certainly no precedent cited by Verizon or by *Broward County* so holds.

E. Interactive Television Is Clearly A "Cable Service."

While virtually all cable operators agree with us that cable modem service is a "cable service," a few suggest that it is premature to classify interactive television and other "potential services that may develop that make use of a combination Internet and television broadcast platform."[36] The City Coalition suggests that, while it may not be possible to foresee, much less classify, all future services provided over the cable modem platform, it certainly *is* possible to classify interactive television and any future services "that make use of a combination Internet and television broadcast platform." Any such services would easily qualify as a "cable service."

Interactive television and any other service involving a combination with the television broadcast platform would seem to qualify doubly as a "cable service": Those services would not only entail subscriber interaction with or use of "other programming service" under Section 522 (6)(A)(ii), but also would often involve subscriber interaction with or use of "video programming" under Section 522(6)(A)(i) as well. In fact, the legislative history of the 1996 amendment of the "cable service" definition makes plain that one of the specific purposes of the 1996 amendment was to include interactive

[36] AT&T Comments at 32-36 & 100 (quoting *NOI* at ¶49). *See also* NCTA Comments at 67.

television within the "cable service" definition.[37] If, as the cable industry argues (and we wholeheartedly agree), cable modem service is a "cable service," then interactive television offered over a cable system must be as well.

III. THE COMMISSION NEEDS TO ACT IMMEDIATELY AND DECISIVELY TO ELIMINATE THE INCONSISTENCY AND UNCERTAINTY CREATED BY THE *PORTLAND* AND *GULF POWER* DECISIONS.

Despite their divergence on many issues, the opening comments reveal rather widespread agreement on one point: The Commission needs to take decisive and prompt action to eliminate the inconsistency and ambiguity created by *Portland*, *Gulf Power*, and other conflicting precedent on the proper regulatory status of cable modem service.[38] The uncertainty spawned by this conflicting precedent ill serves the interests of industry, local governments, the Commission, or the public. We will leave to industry the discussion of the adverse effects of regulatory uncertainly upon it. For local governments, the looming consequences of these conflicting precedents are adverse, financial and immediate.

As the Commission is aware, Cox has announced that in the wake of *Portland*, it will cease paying local governments cable franchise fees on cable modem service in the Ninth Circuit.[39] Since opening comments were filed in this proceeding, the problem has spread. In its December 1 comments in this proceeding, AT&T dismissed *Portland*'s

[37] *See* City Coalition Comments at 6-7.

[38] *See, e.g*, AT&T Comments at 4; NCTA Comments at 41; Earthlink Comments at I; OpenNet Comments at 3; USTA Comments 3; City Coalition Comments at 3.

[39] *See, e.g.*, City Coalition Comments at 12 n. 17.

holding that cable modem service is not a "cable service" as mere "dictum,"[40] and further represented to the Commission that it believed local franchising authorities "have the authority under [§47 U.S.C. §542] to charge a franchise fee on cable operators' gross revenues, including their cable Internet services" and that "AT&T currently pays franchising fees assessed on revenues from its cable Internet services."[41]

Notwithstanding these representations, less than three weeks after it filed its December 1 comments, AT&T sent letters to all of its franchising authorities in the Ninth Circuit informing them that due to *Portland,* it planned to stop paying franchise fees on cable modem service unless those franchising authorities agreed to indemnify AT&T from any liability arising from AT&T's payment of those fees.[42] AT&T's about-face on the matter is, to say the least, perplexing, but it underscores the desperate need for the Commission to step forward and establish once and for all the proper regulatory classification of cable modem service.

In its recent *amicus* briefs in both the Ninth Circuit *Portland* and Fourth Circuit *Henrico* appeals, the Commission took the position that it was the body charged by Congress with implementing federal communications policy but that it had not yet decided the proper regulatory classification of cable modem service. If the Commission is to fulfill its obligations as the body responsible for construing the Act in a uniform way

[40] AT&T Comments at 4.

[41] *Id.* at 31.

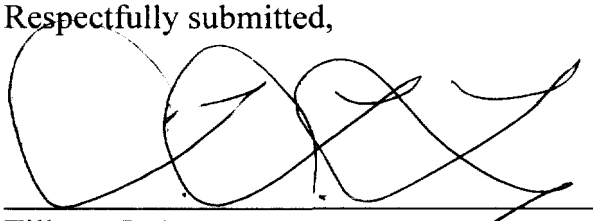
[42] Copies of sample letters from AT&T, and franchising authorities' responses, are included in Attachment A to these reply comments.

to implement national communications policy, then it is incumbent on the Commission to resolve the proper regulatory classification of cable modem service, and to do so immediately. We therefore strongly urge the Commission promptly to initiate and complete a rulemaking proceeding to classify cable modem service as a "cable service" within the meaning of 47 U.S.C. §522(6).

CONCLUSION

For the foregoing reasons, and these set forth in our opening comments, the City Coalition urges the Commission promptly to institute a rulemaking proceeding to classify cable modem service as a "cable service" subject to Title VI. Alternatively, if the Commission were to conclude otherwise (wrongly, we believe), then the Commission should require cable operators to provide third-party ISPs with access to operators' cable modem platforms pursuant to the full open access requirements of Title II.

Respectfully submitted,



Tillman L. Lay

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1900 K Street, N.W., Suite 1150
Washington, DC 20006
(202) 429-5575

Counsel for the City Coalition

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